82-1153

NO.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MOTOR CLUB OF AMERICA INSURANCE COMPANY,
A Corporation of the State of New Jersey,

Appellant,

vs.

STATE OF NEW JERSEY, STATE OF NEW JERSEY DEPARTMENT OF INSURANCE and JAMES J. SHEERAN, NEW JERSEY COMMISSIONER OF INSURANCE,

Appellees.

On Appeal from the Supreme Court of New Jersey

JURISDICTIONAL STATEMENT

STANLEY WEISS, *Counsel for Appellant*
ROBERT E. TURTZ

CARPENTER, BENNETT & MORRISSEY,
Attorneys for Appellant, Motor Club of America Insurance Company,
744 Broad Street,
Newark, New Jersey 07102.
(201) 622-7711

Adams Press Corp., 50 Park Place, Newark, New Jersey 07102—(201) 623-8611

Questions Presented by the Appeal

1. Do the allegations of Appellant's Complaint* that its assets and equity have been drastically eroded and its earning power substantially destroyed by New Jersey's automobile insurance regulatory system which, since 1975, has caused Appellant to incur continuing operating losses and prohibited its withdrawal from such losing business, state claims that Appellees have effected a taking of Appellant's property for a public use without the payment of just compensation required by the Fourteenth Amendment to the United States Constitution?

2. If Appellant's Complaint does state valid claims, have the Courts below denied Appellant federal due process of law by depriving Appellant of the opportunity to prove those claims at a trial?

3. Was it error for the Courts below to preclude a member of a regulated industry from ever recovering for past takings of its property through excessive regulation by holding that just compensation may only be awarded for

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* In addition to Appellant, the parties to the action in the State court were: James J. Sheeran, Commissioner of Insurance; New Jersey Department of Insurance; and the State of New Jersey. Subsequent to the institution of the action, Joseph F. Murphy was named Commissioner of Insurance in place of James J. Sheeran. Pursuant to R. 4:34-4 of the New Jersey Court Rules, (A. 135a) Mr. Murphy is deemed to have been substituted as a defendant in place of Mr. Sheeran.

Appellant's parent company, subsidiaries (except wholly-owned subsidiaries) and affiliates are as follows: Motor Club of America; Motor Club of America Enterprises, Inc. d/b/a Motor Club of America; Motor Club of America Finance Company; Teachers Underwriting Agency; Automobile Association of New Jersey; Modern Care Centers of America, Inc.

takings occurring subsequent to the entry of a declaratory judgment determining that the regulatory system was effecting such takings; and was it further error for the Courts below to hold that Appellant may never seek such declaratory judgment?

4. To the extent that the judgment below is based upon the availability, under N.J.S.A. 17:29A-24 (A. 81a), of judicial review of rate making decisions or implicit findings of laches, waiver, or consent by Appellant; (a) are any of such grounds legally sufficient to bar Appellant's claim for just compensation, and (b) does it not deprive Appellant of federal due process of law to deny it the opportunity to prove at trial its contention (acknowledged by the trial court) that the right to judicial review of automobile insurance rate making may be illusory and its further contentions that a fully developed factual record will not support findings of laches, waiver, or consent in this case?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED BY THE APPEAL	i
PARTIES TO THE PROCEEDING	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS AND COURT RULES	4
STATEMENT OF THE CASE	5
RAISING THE FEDERAL QUESTIONS	14
THE QUESTIONS ARE SUBSTANTIAL	16
CONCLUSION	29

APPENDIX:

Opinion and Judgment of the Superior Court of New Jersey, Appellate Division (June 28, 1982)	1a
Opinion of the Superior Court of New Jersey, Chancery Division (Honorable William A. Dreier, J.S.C.) (June 2, 1981)	5a
Order of the Superior Court of New Jersey, Chancery Division (Honorable William A. Dreier, J.S.C.) (July 6, 1981)	19a
Order of the Supreme Court of New Jersey Dismissing Appeal and Denying Petition for Certification (October 14, 1982)	21a

PAGE

Notice of Appeal to the Supreme Court of the United States (December 29, 1982) 23a

Verified Complaint (October 27, 1980) 26a

Exhibit A to Verified Complaint 43a

Exhibit B to Verified Complaint 47a

Affidavit of David Green (November 12, 1980) .. 48a

Order of the Appellate Division in Automobile Insurance Plans Service Office v. James J. Sheeran, No. A-1024-77 (April 25, 1978).. ..... 63a

Affidavit of Robert J. Schraeder (November 12, 1980) 65a

Appendix A to Schraeder Affidavit 68a

Appendix B to Schraeder Affidavit 73a

Appendix C to Schraeder Affidavit 74a

Statutory Material, Regulations, and Court Rules 75a

PAGE

Table of Authorities

Cases Cited

Aaron v. United States, 311 F.2d 798 (Ct. of Cl. 1963) 24

Armstrong v. United States, 364 U.S. 40 (1960) 18

Automobile Insurance Plans Service Office v. James J. Sheeran, No. A-1024-77 April 25, 1978 10

Board of Pub. U. Comm'rs v. N.Y. Telephone Co., 271 U.S. 23 (1926) 19

Brooks-Scanlon Co. v. R.R. Comm'n, 251 U.S. 396 (1920) 15, 19, 29

Bullock v. Railroad Comm'n, 254 U.S. 513 (1921) 19

Federal Power Comm. v. Hope Natural Gas Co., 329 U.S. 591 (1944) 19, 25, 29

Garrity v. New Jersey, 385 U.S. 493 (1967) 26

Hilkovsky v. United States, 504 F.2d 1112 (Ct. of Cl. 1974) 24

In re Intrastate Industrial Sand Rates, 66 N.J. 12, 327 A.2d 427 (1974) 8, 25

In re N.J. Power & Light Co., 15 N.J. 82, 104 A. 2d 1 (1954) 8, 24

In re Revision of Rates of Toms River Water Co., 82 N.J. 201, 412 A.2d 430 (1980) 8

In re Valuation Proceedings Under §§ 303(c) and 306 of the Regional Rail Reorganization Act, 439 F. Supp. 1351 (Sp.Ct. RRRA 1977) 28

Insurance Co. of North America v. Howell, 80 N.J. Super. 236, 193 A.2d 386 (App. Div. 1963) 8

PAGE

In the Matter of Jersey Central P & L Co., 166 N.J. Super. 540, 400 A.2d 128 (App.Div. 1979) 25

Johnson v. Zerbst, 304 U.S. 458 (1938) 26

Marbury v. Madison, 1 Cranch 137 (1803) 17

Matthews v. Huwe, 269 U.S. 262 (1925) 3

Monongahela Navigation Co. v. United States, 148 U.S. 312 (1892) 25, 29

New Haven Inclusion Cases, 399 U.S. 392 (1970) 19

North Countries Hydroelectric Co. v. U.S., 118 F. Supp. 375 (Ct. of Cl. 1954) 22

Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978) 18

Pennsylvania Coal Company v. Mahon, 260 U.S. 393 (1922) 18, 22

Railroad Comm'n v. Eastern Texas R.R., 264 U.S. 79 (1924) 19

Regional Rail Act Cases, 419 U.S. 102 (1974) ..15, 19, 20, 29

San Diego Gas & Electric Co. v. San Diego, 450 U.S. 621 (1981) 19, 20, 29

Sheeran v. Nationwide Mutual Ins. Co., 80 N.J. 548, 404 A.2d 625 (1979) 7

Smyth v. Ames, 169 U.S. 466 (1898) decree modified 171 U.S. 361 (1898) 18, 19

Sullivan v. Texas, 207 U.S. 416 (1908) 3

Tumey v. Ohio, 273 U.S. 510 (1927) 23

Tyson and Brother v. Barton, 273 U.S. 418 (1922) 22

Union Pacific R. Co. v. Public S. Comm. of Mo., 248 U.S. 67 (1918) 26, 29

United States v. Dickinson, 331 U.S. 745 (1947) 22, 24, 29

PAGE

United States Constitution Cited

Fifth Amendment 4

Fourteenth Amendment ..... i, 3, 4, 15

New Jersey Constitution Cited

Article I, Paragraph 20 ..... 3, 4

Statutes Cited

28 U.S.C. §1257(2) 3

N.J.S.A. 2A:14-1 ..... 4, 21

N.J.S.A. 17:29A-1(f) 4, 9

N.J.S.A. 17:29A-2 ..... 4, 9

N.J.S.A. 17:29A-3 ..... 4, 9

N.J.S.A. 17:29A-6 4

N.J.S.A. 17:29A-7 ..... 4, 8

N.J.S.A. 17:29A-14 ..... 4, 8

N.J.S.A. 17:29A-24 ..... ii, 4

N.J.S.A. 17:29D-1 ..... 4, 7

N.J.S.A. 17:30-8 ..... 4, 12, 15

N.J.S.A. 17:30C-1 through 30C-31 ..... 4, 12, 15, 27

N.J.S.A. 17:30C-3 13

N.J.S.A. 17:30C-4 13

N.J.S.A. 17:30C-9a 13

PAGE

N.J.S.A. 17:30C-9b 13
N.J.S.A. 17:30C-15 ..... 2, 13
N.J.S.A. 17:30C-17 13
N.J.S.A. 17:32-13 ..... 4, 11
N.J.S.A. 39:6A-1 through 6A-20 6
N.J.S.A. 39:6A-3 ..... 4, 7
N.J.S.A. 39:6A-4 ..... 5, 7
N.J.S.A. 39:6A-4a 7
N.J.S.A. 39:6A-4b-4e 7
N.J.S.A. 39:6A-8 ..... 5, 7
N.J.S.A. 39:6A-10 ..... 5, 7
L. 1975, C. 113, § 31 ..... 4, 12

Regulations Cited

N.J.A.C., Title 11, Ch. 3 7
N.J.A.C. 11:3-1.13 ..... 5, 7
N.J.A.C. 11:3-1.16 ..... 5, 9, 26
N.J.A.C. 11:3-8.1 ..... 5, 7

New Jersey Court Rules Cited

R. 2:2-1(a)(1) 2, 5
R. 4:34-4 ..... i, 5

PAGE

Other Authorities Cited

Conning & Company, Regulatory Review Property & Casualty Industry, pp. 5-24, October, 1980 6

Soulor, "Subsidization of Insurance—1979," Alliance of American Insurers, p. 11, September, 1981 11

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Appellees.

On Appeal from the Supreme Court of New Jersey

JURISDICTIONAL STATEMENT

Opinions Below

The opinion of the Superior Court of New Jersey, Chancery Division, and that of the Superior Court of New Jersey, Appellate Division, which are not reported opinions, appear in the appendix hereto (A. 1a through A. 18a). The Supreme Court of New Jersey did not write an opinion in this case.

Jurisdiction

In October, 1980, Appellant Motor Club of America Insurance Company, a New Jersey insurance carrier, commenced this action in the Chancery Division of the Superior Court of New Jersey against Appellees, the State of New Jersey, the State Department of Insurance, and the Commissioner of Insurance. Appellant sought just compensation for the taking of its property by New Jersey's system regulating the automobile insurance industry in that state and certain other relief.* Appellant contends that the cumulative impact of the regulatory system on Appellant since 1975 has been to cross the constitutional perimeter of permissible regulation and to take Appellant's property without the payment by Appellee, State of New Jersey, of constitutionally mandated just compensation in violation of the State and Federal Constitutions.

In October, 1982, without a prior trial or other proceeding for the development of the facts, the New Jersey Supreme Court entered Orders which summarily dismissed Appellant's appeal and denied Appellant's petition for certification.** The effect of the Orders was to allow to stand the June 28, 1982 judgment of the Appellate Division of the New Jersey Superior Court, which required the dismissal of Appellant's Complaint in its entirety for failure

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* Appellant also sought to enjoin Appellees from commencing (on the grounds of capital impairment) delinquency proceedings against it which under N.J.S.A. 17:30C-15 (A. 94a), would lead to the appointment of Appellee, Commissioner, as receiver.

** Appellant appealed as of right to the Supreme Court of New Jersey on the basis that the case involves substantial questions arising under both the Federal and State Constitutions (N.J. Court Rules 2:2-1(a)(1)) (A. 135a). Appellant also, as a matter of caution, sought review in the State Supreme Court by filing a Petition for Certification.

to state a claim upon which relief may be granted, and which denied Appellant leave to amend that Comp[illegible]int.

The New Jersey Supreme Court's order which dismissed Appellant's appeal to that Court was necessarily grounded upon that Court's determination that no substantial constitutional issue was presented by that appeal. Therefore, that Order is a final judgment affirming the Appellate Division's June 28, 1982 judgment, *Tumey* v. *Ohio*, 273 U.S. 510, 515 (1927); *Matthews* v. *Huwe*, 269 U.S. 262 (1925). It is therefore the Dismissal Order of the New Jersey Supreme Court, filed on October 14, 1982, which is now presented to this Court for Review.*

The Notice of Appeal to this Court (A. 23a) was filed in the New Jersey Supreme Court on December 29, 1982. Because Appellant's claim drew into question, under both the State and Federal Constitutions, the validity of several important New Jersey statutes and the regulatory scheme thereunder as applied to Appellant, and because the decision of the New Jersey Supreme Court necessarily upheld the validity, as applied, of those statutes and the regulatory system, Appellant seeks review in this Court by direct appeal pursuant to 28 U.S.C. § 1257(2).**

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* Had Appellant sought review in the New Jersey Supreme Court only by means of its petition for certification, and not by direct appeal, the denial of the petition for certification would not have constituted a final judgment, subject to review by this Court. Instead, the earlier judgment of the Appellate Division would be reviewable here, *Sullivan* v. *Texas*, 207 U.S. 416 (1908).

** We respectfully contend that the interpretation by the Courts below of New Jersey's Constitutional provision prohibiting the taking of private property for public use without just compensation, N.J. Const. Art. I, ¶20, also places that provision in direct violation of the Fourteenth Amendment of the Federal Constitution.

Constitutional Provisions, Statutes, Regulations and Court Rules

Fifth Amendment, United States Constitution:

> . . . nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment, United States Constitution:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law.

Article I, ¶20, New Jersey Constitution:

> Private property shall not be taken for public use without just compensation . . .

New Jersey Laws*:

N.J.S.A. 2A:14-1
N.J.S.A. 17:29A-1(f)
N.J.S.A. 17:29A-2
N.J.S.A. 17:29A-3
N.J.S.A. 17:29A-6
N.J.S.A. 17:29A-7
N.J.S.A. 17:29A-14
N.J.S.A. 17:29A-24
N.J.S.A. 17:29D-1
N.J.S.A. 17:30-8
Laws of 1975, Ch. 113, § 31
N.J.S.A. 17:30C-1 through 30C-31
N.J.S.A. 17:32-13
N.J.S.A. 39:6A-3

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* The Statutory Material, Regulations, and New Jersey Court Rules are reproduced in the Appendix hereto at A. 75a through A. 136a.

N.J.S.A. 39:6A-4
N.J.S.A. 39:6A-8
N.J.S.A. 39:6A-10

Regulations:

N.J.A.C. 11:3-1.13
N.J.A.C. 11:3-1.16
N.J.A.C. 11:3-8.1

New Jersey Court Rules:

R. 2:2-1(a)
R. 4:34-4

Statement of the Case

Appellant, the major subsidiary of Motor Club of America ("MCA"), was incorporated in New Jersey in 1928, and has, throughout its history, been principally engaged in insuring New Jersey automobile risks.* Appellant has been managed for its entire business existence by members of the family which founded it and its corporate parent, and, through the early 1970s, it prospered as a relatively small, stable, and profitable company. Thus, at year-end 1973, its surplus as to policyholders was $21,026,296 on a statutory insurance accounting basis, and its stockholders' equity was $26,098,990 on the basis of generally accepted accounting principles (A. 51a, 52a, 53a).

However, beginning in the year 1975, and continuing, without interruption, beyond the filing of the Complaint

* By way of example, in 1979, more than 77% of Appellant's net premiums were on account of New Jersey automobile policies and 90% of its net premiums were on account of all New Jersey policies (A. 27a).

herein in October, 1980, Appellant has suffered massive losses from its automobile business. During the years 1975 through 1979 those losses aggregated $31,634,621 (A. 56a). Thus, despite capital contributions of $10,250,000 to Appellant between 1976 and 1979 by its corporate parent, MCA, and by other companies affiliated with MCA, Appellant's surplus to policyholders at December 31, 1979 had been eroded to $3,209,000 on a statutory basis and its stockholders' equity reduced to $10,038,000 on a GAAP basis (A. 53a). But for the $10,250,000 contributed to Appellant (A. 53a) (and absent any consideration of the value of the present claims of Appellant) Appellant would have been insolvent.

Appellant contended and was prepared to prove that the drastic, adverse turn in its circumstances between 1975 and October, 1980, was directly caused by sweeping changes, introduced in the 1970s, in the system governing the automobile insurance business in New Jersey—changes which have brought massive operating losses to all automobile insurers in New Jersey and have marked New Jersey's regulatory system as the most oppressive and unsuccessful in the nation.*

In large measure the fundamental changes to the regulatory system were accomplished with the 1972 enactments of New Jersey statutes requiring compulsory liability insurance and "no-fault" insurance after January 1, 1973, N.J.S.A. 39:6A-1 through 6A-20. Those laws set forth certain mandatory provisions which must be included in all automobile policies or made available at the insured's op-

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*A 1980 industry poll taken by Conning & Company indicated that 100% of the responding companies listed New Jersey as the worst state in the Union in which to do automobile insurance business (Conning & Company, *Regulatory Review Property & Casualty Industry*, pp. 5-24, October, 1980).

tion, *e.g.*, no fault personal injury protection benefit features which include unlimited medical protection (N.J.S.A. 39:6A-4a) (A. 111a, 112a); mandatory and additional income continuation benefits, essential service benefits, survivor benefits, and funeral expense benefits (N.J.S.A. 39:6A-4b through 4e; N.J.S.A. 39:6A-10) (A. 112a-115a); and compulsory liability coverage in the amounts of $15,000/30,000/$5,000 (N.J.S.A. 39:6A-3) (A. 110a). Despite the no-fault features, the statute provides only a token exemption from tort liability for personal injuries in the form of a $200 medical bill threshold, N.J.S.A. 39:6A-8 (A. 113a).

The governing statutes further require that every owner or registered owner of a car registered or principally garaged in New Jersey have such automobile insurance. (N.J.S.A. 39:6A-3; 6A-4; 6A-10). They also direct that the New Jersey insurance industry, through the Automobile Insurance Plan,* provide that coverage, regardless of the suitability of a particular person as a risk from an underwriting perspective, N.J.S.A. 17:29D-1 (A. 82a). Furthermore, New Jersey automobile policies are cancellable only on limited grounds, and (with unimportant exception) are subject to indefinite renewal despite their demonstrable unprofitability, *Sheeran* v. *Nationwide Mutual Ins. Co.*, 80 N.J. 548, 404 A.2d 625 (1979); N.J.S.A. 39:6A-3 (A. 111a); N.J.A.C. 11:3-8.1** (A. 127a).

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* The Automobile Insurance Plan is set forth in the New Jersey Administrative Code, Title 11, Chapter 3 ("N.J.A.C., Title 11, Ch. 3").

** In the case of assigned risk policies under the Automobile Insurance Plan, the insurer is obligated to keep the risk for three years, after which the risk returns to the pool for reassignment if other insurance is not available (which is virtually always the case), N.J.A.C. 11:3-1.13 (A. 115a). The dropping of particular assigned risks after three years (or the cancellation of policies for nonpayment of premium during the three year period) does not alleviate the burden upon the insurer because new assigned risks necessarily replace the old ones as a matter of course.

In addition to mandating the nature and content of the automobile insurance policy and its required purchase by all New Jersey automobile owners, the statute vests Appellee, Commissioner of Insurance, with control over the approval of rates and premiums to be charged for those policies, N.J.S.A. 17:29A-7, N.J.S.A. 17:29A-14 (A. 79a, 80a). This control, exercised by a required prior approval of changes in rates, is of particular significance in light of the massive and continuing increases in the actual cost of the product which the State requires to be sold. Because all vehicle owners must purchase the product, irrespective of their ability to pay premiums which would cover those costs and which would be compensatory to the insurers, Appellees have considerable motivation, and through the Commissioner's control of rate approvals, the opportunity to keep rates and premiums at a minimum. Moreover, the statutory scheme provides no built-in protection against "regulatory lag," *i.e.*, there are no provisions authorizing interim rates while rate applications are pursued, and there is no provision limiting the time within which rate decisions must be made.* Furthermore, in New Jersey rates may be set prospectively, only, *In re N.J. Power & Light Co.*, 15 N.J. 82, 104 A.2d 1 (1954); *In re Intrastate Industrial Sand Rates*, 66 N.J. 12, 23, 327 A.2d 427, 433 (1974). They cannot be put into effect retroactively, even to the date of the application, *In re Revision of Rates of Toms River Water Co.*, 82 N.J. 201, 412 A.2d 430 (1980); and this is so even if the regulatory lag is unreasonable, *id*, 213, 214.

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* The provision in N.J.S.A. 17:29A-7 which requires the Commissioner to act within 90 days of the filing of a rating system, applies only to filings of original systems. It does not apply to filings seeking approvals of rate changes, *Insurance Co. of North America* v. *Howell*, 80 N.J. Super. 236, 193 A.2d 386 (App.Div. 1963).

With respect to both the voluntary market and the residual market, Appellant is a subscriber or member of statutorily recognized rating organizations, N.J.S.A. 17: 29A-1(f); 29A-2; 29A-3 (A. 75a, 76a, 77a), which file and prosecute rate change applications on behalf of their members and subscribers.* For reasons which we discuss, *infra*, pp. 26-27 Appellant lacks the power to effectively challenge the determinations which are periodically made as a result of the rating organizations' filings, and those determinations have, in the main, established the rates and premiums charged by Appellant.

In practice, this rate making system resulted in substantial abuses under the Appellee, Commissioner Sheeran, who routinely not only delayed and severely cut legitimate applications for rate changes but also coercively conditioned his grants of relief upon the withdrawal of pending applications and the substitution in their stead of new applications for the lesser amounts he was prepared to grant rather than the greater amounts to which the applicants were entitled.

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* Appellant is a subscriber to Insurance Services Office ("ISO") which files for its subscribers and members rate applications applicable to the voluntary market. Appellant is a subscriber to Automobile Insurance Plan Services Office ("AIPSO") which makes similar filings for rate approvals applicable to the residual market. With respect to the voluntary market, insurers may file rate applications, individually. While some of the larger insurers do make such individual filings, smaller companies such as Appellant cannot, on an actuarial basis, produce information upon which they could base individual filings. Unlike the case of the voluntary market, all insurers must be subscribers to AIPSO for purposes of the residual market and be bound by the uniform rates set as the result of AIPSO filings. N.J.A.C. 11:3-1.16 (A. 116a).

We contend that what typically occurred was as follows: A rating organization applied for an increased rate, and the Commissioner, after substantial delay, advised that he would grant a considerably smaller increase but only if the application were withdrawn and a new one for the lesser amount filed. If the new application were not filed for the lesser amount, the Commissioner would then deny the application in its entirety. The industry almost always complied, taking what it could get "up front," rather than foregoing any increase at all during a period of protracted litigation which, if won, would lead to a better rate, but which would apply only prospectively from the date of favorable court action and would therefore be largely rendered inadequate by the inflation occurring during the pendency of the matter before the Department and the courts. Because the original application had been withdrawn and a new one filed for the relief actually granted, attempts to secure judicial review have been dismissed as moot.*

That the New Jersey automobile regulatory system has thus operated coercively and is clearly diseased cannot be denied. Symptoms of the disease and its effect upon the New Jersey automobile insurance industry fill the public record. For example, as the studies of A.M. Best Company, Inc. show,** in the year 1979 the fifteen

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* *See, e.g.,* unpublished Order of the Appellate Division of the Superior Court of New Jersey in *Automobile Insurance Plans Service Office* v. *James J. Sheeran,* No. A-1024-77, April 25, 1978 (A. 63a).

** See November 7, 1980 Affidavit of Robert J. Schraeder, Vice President of A.M. Best Company, Inc. (particularly ¶6), filed in this case on November 12, 1980 in support of Appellant's application to the Superior Court of New Jersey, Chancery Division, for the entry of an interlocutory injunction (A. 65a, 66a).

largest New Jersey automobile insurers paid out $201 million more in automobile accident claims than they collected in premiums. As against that underwriting loss the industry realized investment income and gain allocable to New Jersey automobile insurance business of $63,200,000 for a net New Jersey automobile loss of $137,800,000. In prior years the comparable losses to the industry were $109,900,000 in 1978; $63,300,000 in 1977; $145,500,000 in 1976; and $168,600,000 in 1975. In aggregate the fifteen largest carriers lost 625,100,000 as the result of New Jersey automobile insurance business between 1975 and 1979. As a consequence, companies doing business in the State will not write new policies in the "voluntary" market, with the result that new business goes into the residual market which the companies must service at huge losses under the Automobile Insurance Plan. These market distortions have led to a situation in which in 1979, New Jersey, alone, accounted for fully *33%* of the nationwide automobile residual market losses! (Soulor, "Subsidization of Insurance—1979," Alliance of American Insurers, p. 11, Sept., 1981).

The larger companies have been able to offset their New Jersey auto losses by auto profits earned in other states and by profits from other lines of business in New Jersey and elsewhere. A significant number of foreign insurers, which are not limited by any prohibition against voluntarily ceasing business operations, have surrendered their certificates of authority under N.J.S.A. 17:32-13 (A. 109a) and have simply withdrawn from the state. Appellant, on the other hand, has had to bear the full brunt of the coercive system. Its concentration on the New Jersey auto insurance market has precluded the offset of profits from other states or lines; and the fact that it is a domestic carrier has

precluded its withdrawal from New Jersey.* This preclusion was brought about by statutory developments in 1975 when the New Jersey legislature totally abrogated the right of a New Jersey incorporated insurance company to voluntarily cease operations, dissolve, and liquidate. That right had been previously enjoyed, at least in theory,** and had been set forth in N.J.S.A. 17:30-8 (A. 82a). In 1975 that statute was repealed by L. 1975, c. 113, § 31, (A. 84a), effective June 3, 1975, and the legislature simultaneously enacted the Rehabilitation and Liquidation Act, N.J.S.A. 17:30C-1 through 30C-31 (A. 84a), also effective June 3, 1975, and which provides in pertinent part:

(a) "Delinquency proceedings pursuant to this Act shall constitute the sole and exclusive method of liqui-

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* As stated in the August 4, 1980 edition of Best's Insurance Management Reports (Appendix B to the Affidavit of Robert J. Schraeder, Vice President of A.M. Best Co., Inc., A. 65a):

> Despite the pullout of a number of companies from New Jersey and the glaring need for an adequate rate and reform of the no-fault law, Commissioner Sheeran has evinced little concern for the plight of the automobile insurers in his jurisdiction. The rationale appears to be that the underwriting profits from other lines and other states can carry the New Jersey burden. . . .
>
> . . . In the case of the Motor Club [Appellant], with auto insurance as the primary business and with 40% of that business coming in as assigned risks, the consequences have been disastrous.
>
> * * *
>
> . . . Unlike Geico, Nationwide, SAFECO and others that have done so, MCA has no option to withdraw from the State (A. 73a).

** See footnote, p. 15 *infra*.

dating, rehabilitating, reorganizing or conserving an insurer, and no court shall entertain a petition for the commencement of such proceedings, or any other similar procedure, unless the same has been instituted by the Commissioner" (17:30C-3);

(b) "The Commissioner shall commence any such proceeding by an application . . ." (17:30C-4);

(c) "Whenever under the laws of this State a receiver is to be appointed in delinquency proceedings for a domesic insurer, the Court shall appoint the Commissioner as such receiver" (17:30C-15);

(d) "An order to rehabilitate a domestic insurer shall direct the Commissioner forthwith to take possession of the property of the insurer and to conduct the business thereof" (17:30C-17);

(e) "An order to liquidate the business of a domestic insurer shall direct the Commissioner forthwith to take possession of the property of the insurer, to liquidate the business, to deal with the insurer's business and property in his own name as Commissioner or in the name of the insured . . ." (17:30C-9a);

(f) "The Commissioner may apply under this act for an order dissolving the corporate existence of a domestic insurer." (17:30C-9b).

The effect of these 1975 enactments has been to abolish Appellant's right to voluntarily cease operations and to close all forums to any applications by Appellant for that purpose, even in the face of continuing unabated losses. As a result the statute has granted the Com-

missioner the sole power to decide whether and on what terms liquidation should occur. The trial court stated its agreement with this conclusion (A. 6a, 7a, 17a), although the Appellate Division stated that it was unnecessary for it to reach the question in view of its other determinations (A. 3a).

Raising the Federal Questions

Appellant commenced this action to prove, *inter alia*, that the cumulative impact of the regulatory system effected a taking of its property for which it is entitled to just compensation. The federal questions were raised at the outset by Appellant's Verified Complaint (A. 26a through 47a). Specifically, in Count I Appellant set forth in detail New Jersey's statutory and regulatory enactments of the 1970s, which dramatically changed the system regulating the automobile insurance industry and which caused the true costs of the compulsory "no-fault" and liability policy to skyrocket. Appellant further detailed the confiscatory regulatory policies and determinations of Appellees and asserted:

> 13. The continuing losses . . . [of Appellant] . . . have been caused by New Jersey's confiscatory statutory and regulatory framework and the confiscatory regulatory policies and decisions of defendant, Commissioner. By virtue of the foregoing [Appellant's] property has been taken by the State of New Jersey for a public use without just compensation in violation of the Fourteenth Amendment of the United States Constitution and . . . (A. 32a, 33a).

In Count II (A. 33a) Appellant asserted that because of its continuing loss operations, it had a federal constitutional right to cease its business operations and withdraw its assets from the losing venture, citing *Brooks-Scanlon Co.* v. *R.R. Comm'n*, 251 U.S. 396, 399 (1920). It further asserted that the 1975 enactment of the Insurance Company Rehabilitation and Liquidation Act, N.J.S.A. 17:30C-1 through 17:30C-30 and the simultaneous repeal of N.J.S.A. 17:30-8, deprived New Jersey incorporated insurers of their previously enjoyed right to voluntarily cease business, dissolve, and liquidate. Appellant accordingly contended that the statutory abrogation* of its *"Brooks-Scanlon"* withdrawal rights in the face of its continuing losses amounted to an "erosion taking" of its property in violation of the Fourteenth Amendment of the United States Constitution, and entitling it to compensation therefor under the principles enunciated by this Court in the *Regional Rail Act Cases*, 419 U.S. 102 (1974).

Appellees moved to dismiss the Verified Complaint for failure to state a claim upon which relief may be granted. After extensive briefing of the federal constitutional (and other) issues and oral argument, the trial judge entered an order (A. 19a): (a) dismissing all of Appellant's claims for compensation set forth in Counts I, II, and III; (b) refusing to dismiss Count I insofar as it seeks declaratory relief as to the unconstitutionality of the insurance regulatory system; (c) dismissing Counts II and III in their entirety based upon a finding that Appellant had never sought

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* In Count III (A. 35a) Appellant made the same allegations as in Count II with the following difference. In Count III Appellant stated that even prior to the statutory abrogation of its withdrawal rights in 1975, those rights were largely illusory because of the restraints imposed thereon by the regulatory system governing Appellant's business operations, *e.g.*, restricted cancellation and nonrenewal rights.

to cease its business operations in the past;* and (d) granting Appellant leave to amend Counts II and III to affirmatively assert a desire by Appellant to cease business.**

Upon appeal, the Appellate Division of the Superior Court of New Jersey affirmed the trial Court's Order to the extent that the trial Court's order had dismissed portions of the Verified Complaint; it reversed the remainder of the trial Court's Order; and it directed the trial Court to dismiss the Verified Complaint in its entirety (A. 2a). Appellant thereafter sought review in the Supreme Court of New Jersey (a) by direct appeal premised on the presence of substantial questions arising under the Federal and State Constitutions, and (b) by means of a petition for certification. By final Orders of October 12, 1982, filed October 14, 1982, the New Jersey Supreme Court summarily dismissed the appeal and denied Appellant's petition for certification (A. 21a).

The Questions are Substantial

This case raises the question of whether a state can be held accountable to pay just compensation where the cumulative impact of its regulatory system has been to take the

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* We respectfully submit that this determination is wholly without foundation in the record. Appellant never conceded that it hadn't tried to stop operating and offered to prove the contrary. Moreover, it contended that, as a matter of law, it had no obligation to either "desire" or attempt to do a futile act.

** The Court's opinion stated: "If Appellant amends its complaint to assert a desire to quit operating, then, and from that time forward only, a cause of action is stated . . . (A. 18a).

assets of a member of a regulated industry. Appellant contends that New Jersey, in furtherance of the public weal, undertook a new social experiment in the regulation of the automobile insurance business. It mandated the sale of an extremely expensive insurance product; it required that the product be sold to all vehicle owners; it required that the product be sold below cost; and it impeded the ability of all insurers to stop selling the product and seized control of the rights of domestic insurers to decide whether to withdraw from such business, as well as to control the terms and incidents of any such withdrawal.

The experiment failed; and in its course, it destroyed the assets, net worth, and earning power of Appellant which had been nurtured over a generation of conscientious effort. New Jersey has now told Appellant, for reasons that are less than clear in the opinions below, that it has no remedy and is not entitled to a trial of its claim that its assets have been taken for a public use without the payment of just compensation. Whatever might be said for the practicality of the result, it is unprincipled and it is inconsistent with the many opinions of this Court which have sought to define the constitutional balance between the power of the sovereign and the rights of the property owner.

What is demonstrably the most coercive, unfair, and clearly unworkable insurance regulatory system in the country has been placed beyond the law and the Constitution and has been insulated from any comprehensive challenge by aggrieved citizens claiming past or threatened future injury. Such a result ignores the observation in *Marbury* v. *Madison*, 1 Cranch 137, 163 (1803) that "the very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." It disregards the long

established proposition that harsh regulation may, if it becomes sufficiently onerous, cross the constitutional line between legitimate regulation and a taking of property. *See, e.g.*, the statement of Holmes, J. in *Pennsylvania Coal Company* v. *Mahon*, 260 U.S. 393, 415, 416 (1922) that: ". . . while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." It denies the right of Appellant to prove that "in all fairness and justice," Appellee, State of New Jersey, on behalf of the public, rather than Appellant, should bear the financial burdens of the diseased New Jersey automobile regulatory system, *see Armstrong* v. *United States*, 364 U.S. 40 (1960). The question of how far is "too far" is not an easy one. As stated by Justice Brennan, writing for the Court in *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 124 (1978) "this Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, . . ." Justice Brennan noted that a determination of the issue involved "essentially *ad* hoc, factual inquiries," and he identified "economic impact," interference with "distinct investment-backed expectations" and "the character of the governmental action" as particularly significant factors to be considered in deciding whether a taking had occurred as the result of that government action.

Under the circumstances, what proper justification is there for denying Appellant the opportunity to prove its case? It cannot be that it has failed to state a claim that a taking has occurred. The Complaint alleges a denial of the opportunity to earn a fair return; and even a regulated industry must be allowed such opportunity, however a "fair return" is defined, *Smyth* v. *Ames*, 169

U.S. 466 (1898) *decree modified* 171 U.S. 361 (1898); *Board of Pub. U. Comm'rs* v. *N.Y. Telephone Co.*, 271 U.S. 23 (1926); *FPC* v. *Hope Natural Gas Co.*, 329 U.S. 591 (1944). The Complaint also alleges that Appellant's right to withdraw from loss operations was destroyed; and this Court has repeatedly recognized that such a right is entitled to constitutional protection, *Brooks-Scanlon Co.* v. *R.R. Comm'n supra; Bullock* v. *Railroad Comm'n*, 254 U.S. 513 (1921); *Railroad Comm'n* v. *Eastern Texas R.R.*, 264 U.S. 79, 84 (1924); *New Haven Inclusion Cases*, 399 U.S. 392 (1970); *Regional Rail Act Cases, supra.*

The Complaint therefore alleges cognizable claims of regulatory takings. The remedy it seeks of the payment of just compensation for such takings is strongly supported by further opinions of this Court. *San Diego Gas & Electric Co.* v. *San Diego*, 450 U.S. 621 (1981) involved the question of whether the Fourteenth Amendment permitted limiting the remedy for a regulatory taking to declaratory relief. The majority declined to reach the merits of the question, holding that the Court lacked jurisdiction because of the absence of a final judgment below. Four members dissented on the jurisdictional holding and concluded on the merits that just compensation was required—a view expressly endorsed as well by Justice Rehnquist, a member of the majority. In an earlier, and even closer case to the present one, *Regional Rail Act Cases, supra*, it was held that the availability of a just compensation award under the Tucker Act for any potential erosion taking that might occur in the future justified rejecting a challenge to the facial constitutionality of the Regional Rail Reorganization Act. This holding sought to accommodate the public's need for a different type of social experiment with the constitutional protection afforded to property rights that

might be taken in the course of it; and the holding provides compelling authority for Appellant's present claim. The *Regional Rail Act Cases, supra,* along with the indications in the *San Diego Gas & Electric Co.* case, *supra,* stand in sharp contrast with the views stated below that just compensation is not an appropriate remedy for erosion takings of the property of regulated industries that occur before entry of a declaratory judgment that the regulation effects such takings.*

There is an undefinable measure in which the opinions below seem based upon other considerations, reflecting the view that Appellant's own conduct precludes its recovery or even the opportunity to prove what that conduct was or its justification. The opinions assume that Appellant waited too long in filing this suit, that it may have consented to the takings (or waived its rights) by failing to raise its issues at administrative or judicial levels of rate making proceedings, or that it failed to express the desire, or take other steps, to withdraw from business.** None of the assumed facts is sup-

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* There is nothing in the language of the Constitution or prior cases to justify the distinction drawn in the Trial Court's opinion between the protection afforded real property owners and that afforded to the property interests of members of regulated industries (A. 13a-15a). Moreover, the Trial Court's conclusion that the latter have greater control over the taking process is unsupported and contrary to the theory of Count I of the Complaint which the Trial Court generally accepted.

** Appellees' principal argument in the Courts below was that Appellant's action constituted a collateral attack upon prior rate making decisions. The Trial Court rejected that argument (A. 11a-13a), and nothing in the Opinion of the Appellate Division suggests that that Court disagreed with the Trial Court on the issue.

ported by record proof. Each of them is contravened by Appellant which contends that, given the opportunity, it can show at trial, or even by affidavit (i) that the timing of the filing of the suit was reasonable; (ii) that it never had any realistic opportunity to present the issues raised by the suit in another forum and has not waived the constitutional rights which it asserts here; and (iii) that, prior to the filing of the suit, it made various unsuccessful efforts to cease writing policies, to wind down its business and to dispose of its assets in a manner protective of the interests of its creditors, policyholders, and shareholders. The Courts below were obliged on a motion to dismiss to accept that Appellant might make such showings. Instead, they assumed the contrary and imposed what are, in effect, irrebutable presumptions against Appellant as to the facts in question. Moreover, their decisions passed over important legal issues which bear heavily on the significance of those facts and which require resolution in any proper consideration of the matters. The need for such consideration is demonstrated by the following:

(a) On timeliness.

First, Appellant's claim for compensation is a legal claim, not an equitable one; and its timeliness *vel non* is governed by the applicable statute of limitations,* not by the equitable concept of laches.

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*Although Appellees never asserted the defense of the statute of limitations, and the issue of what is the proper statute was never before the State Courts, we submit that the proper limitations period is six years from the accrual of Appellant's claim, N.J.S.A. 2A:14-1 (A. 75a).

Second, and more important, the issue of when Appellant's claim arose, which is, of course, a question of fact, *North Countries Hydroelectric Co.* v. *U.S.*, 118 F. Supp. 375 (Ct. of Cl. 1954), is a subtle one, requiring a determination of when the cumulative impact of the regulatory system effected a taking of Appellant's property. As Justice Holmes pointed out in *Pennsylvania Coal Company* v. *Mahon, supra,* 413, 415, 416, and in his dissent in *Tyson and Brother* v. *Barton,* 273 U.S. 418, 445-446 (1922), Appellant was clearly required to absorb losses of some severity over a period of time before a taking of its property could be recognized to have occurred. Appellant is prepared to introduce evidence of the cumulative impact on it, over time, of the regulatory system, evidence which will permit a court to determine when the effect became severe enough to effect a taking of Appellant's property. Thus, to the extent that the Trial Court's dismissal of the compensation claims, affirmed by the Appellate Division and State Supreme Court, was based upon the erroneous premise that Appellant was under a duty, at its peril, to promptly determine when its cause of action arose and to immediately bring suit, that dismissal cannot be sustained. *See, United States* v. *Dickinson,* 331 U.S. 745 (1947) where this Court, speaking through Justice Frankfurter, stated:

> The Government could, of course, have taken appropriate proceedings to condemn as early as it chose both land and flowage easements. By such proceedings it could have fixed the time when the property was "taken." The Government chose not to do so. It left the taking to physical events, thereby putting on the owner the onus of determining the decisive moment in the process of acquisition by the United States when the fact of taking could no longer be in controversy.
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The Fifth Amendment expresses a principal of fairness and not a technical rule of procedure enshrining old or new niceties regarding "causes of action" —when they are born, whether they proliferate, and when they die. We are not now called upon to decide whether in a situation like this a landowner might be allowed to bring suit as soon as inundation threatens. Assuming that such an action would be sustained, it is not a good enough reason why he must sue then or have, from that moment, the statute of limitations run against him. If suit must be brought, lest he jeopardize his rights, as soon as his land is invaded, other contingencies would be running against him—for instance, the uncertainty of the damage and the risk of res judicata against recovering later for damage as yet uncertain. The source of the entire claim—the overflow due to rises in the level of the river—is not a single event; it is continuous. And as there is nothing in reason, so there is nothing in legal doctrine, to preclude the law from meeting such a process by postponing suit until the situation becomes stabilized. An owner of land flooded by the Government would not unnaturally postpone bringing a suit against the Government for the flooding until the consequences of inundation have so manifested themselves that a final account may be struck.

When dealing with a problem which arises under such diverse circumstances procedural rigidities should be avoided. All that we are here holding is that when the Government chooses not to condemn land but to bring about a taking by a continuing process of physical events, the owner is not required to resort either to piecemeal or to premature litigation to ascertain the just compensa-

tion for what is really "taken." 331 U.S. 745, 747, 748, 749.

See also Hilkovsky v. *United States,* 504 F.2d 1112, 1114 (Ct. of Cl. 1974); *Aaron* v. *United States,* 311 F.2d 798, 800, 801 (Ct. of Cl. 1963).

(b) On the opportunity to present the issues in other forums and waiver of rights.

The Appellate Division, while denying Appellant's rights to just compensation for the reasons indicated by the trial court, went on to also deny Appellant's rights to declaratory relief as to the unconstitutionality of the system, based upon its conclusion that: "The asserted delays in the administrative process or other allegedly improper regulatory practices can only appropriately be presented and considered in the context of a rate proceeding."* (A. 3a, 4a). Such conclusion is clearly erroneous for the reason that the issues raised by Appellant in this action for past takings are not cognizable in a rate-making proceeding and are wholly different from those which may be raised in such proceeding.

In New Jersey the issue involved in rate-making is the fairness of a rate which is designed to operate in the future, *In re N.J. Power & Light Co.,* 15 N.J. 82, 104 A.2d 1 (1954)—not whether past rates afforded a compensable return to the company. And rates, so established

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* To the extent that this statement can be read to apply to past rate making proceedings, the principles of *United States* v. *Dickinson, supra,* discussed under the prior heading dealing with timeliness, as well as the principles now discussed, show why the statement is incorrect and why Appellant should not be foreclosed from maintaining this action for failure to seek review of such prior rate making decisions.

for prospective applications, may not contain a surcharge to compensate the company for past losses, *In re Intrastate Industrial Sand Rates,* 66 N.J. 12, 23, 327 A.2d 427, 433 (1974). Rate-making therefore raises questions primarily addressed to "due process" considerations, *i.e.*— the adequacy of the proofs as to the likely future impact of proposed rates—rather than to considerations involved under the "taking" clause, *see Federal Power Comm.* v. *Hope Natural Gas Co.,* 329 U.S. 591 (1944). Indeed, the Commissioner, an officer of the Executive Branch, lacks jurisdiction over the subject matter of claims for compensation for past takings of private property, *Monongahela Navigation Co.* v. *United States,* 148 U.S. 312, 327 (1892); *In the Matter of Jersey Central P & L Co.,* 166 N.J. Super. 540, 544, 400 A.2d 128, 130 (App. Div. 1979). Since those claims could not have been raised before the Commissioner in a rate-making proceeding, they would not have been before a Court reviewing the results of such proceeding. Appellant is entitled to a forum in which to try its claims that the cumulative impact of the system has effected a taking of its property; and it is clear that the Commissioner's rate-making proceedings are not such a forum.

Moreover, as set forth, *supra,* pp. 5-10 the inherent nature of the regulatory system and its coercive administration by Appellee, Commissioner, discouraged virtually all judicial review of rate making.* Consequently, as we now show, failure to challenge rate making determinations cannot be deemed to be a waiver of the constitutional

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* The factual issues, which issues are involved in this case, of whether the Commissioner did administer the system coercively and whether the effect of such administration was to discourage virtually all judicial review of rate-making, could hardly have been raised in any evidentiary hearing before the Commissioner.

rights asserted here by Appellant, *Union Pacific R. Co.* v. *Public S. Comm. of Mo.*, 248 U.S. 67 (1918); *Garrity* v. *New Jersey*, 385 U.S. 493 (1967); *Johnson* v. *Zerbst*, 304 U.S. 458 (1938).

The governing bodies of the rating organizations, ISO and AIPSO, faced with the choice of accepting inadequate rate increases which would be approved by the Commissioner or seeking judicial review of the Commissioner's denial of any rate increases, have chosen the former alternative because of their fears that any victory in a protracted judicial challenge would be a pyrrhic one,—of little or no economic benefit whatever. Those fears were realistic because during the pendency of the review proceedings, no interim increases would be in effect and because any rates ultimately established as the result of the review proceedings would only operate prospectively from the date they were established.*

Also, Appellant could not have conducted its own filings because it is not large enough to generate the actuarial information needed to support them and because, with respect to assigned risks, such rates must be uniform and cannot be different from the AIPSO rates, *see* N.J.A.C. 11:3-1.16 (A. 116a). Furthermore, it is not reasonable to believe that Appellant could sell policies competitively if, by some means, it could secure rates significantly higher than the prevailing industry rates

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* There is also a serious question of whether Appellant, acting alone, would have had standing to seek judicial review of rate determinations in proceedings initiated by ISO and AIPSO, where those determinations were accepted by those organizations, albeit (as Appellant alleges) under duress.

in the voluntary market.* We therefore respectfully submit that Appellant, by failing to challenge individual rate determinations in which the industry acquiesced, has not waived its constitutional right to just compensation as asserted in this case.

(c) Attempts to withdraw from business.

The Courts below concluded that at no time prior to the institution of this action did Appellant seek to withdraw from business (A. 4a, 17a) and utilized that conclusion as the basis for the dismissal of Counts II and III of the Complaint, the Counts premised upon Appellees' abrogation of Appellant's constitutionality protected withdrawal rights. The conclusion was improper for two reasons: (a) it was wrong to prejudge the factual question of whether Appellant desired or attempted to cease operating without affording Appellant an opportunity to submit proofs on the issue and (b) the assumed facts have no legal relevance to Appellant's claim because N.J.S.A. 17:30C-1 through C-31 destroyed Appellant's withdrawal rights and closed all forums to Appellant for the purpose of voluntary withdrawal.

With respect to the factual conclusion reached by the State Courts, we simply do not understand its basis. We specifically argued to the Trial Court, the Appellate Division, and the New Jersey Supreme Court, that it was premature to reach a judgment on the issue at this time; that the ultimate determination of the issue depended upon the interpretation to be placed upon the

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* In an attempt to remedy the harsh impact of the system on Appellant, Appellant was permitted for a time to charge a rate 7% higher than the prevailing rates with respect to its voluntary market business.

relevant events and a stream of written and oral communications between Appellant and Appellees, the substance of which are not in the record, but which were subject to proof at trial; and finally, that upon Appellees' motion to dismiss for failure to state a claim, Appellant's factual assertion that it has been compelled by Appellees to continue its business despite its losses should be accepted as true.

As for the issue of relevance, the State Courts' requirement that Appellant must allege or demonstrate a "desire," or attempt, to cease operating as an element of these claims is contrary to the decision and reasoning of the Special Court in *In re Valuation Proceedings Under §§ 303(c) and 306 of the Regional Rail Reorganization Act,* 439 F.Supp. 1351 (Sp.Ct. RRRA 1977) where Judge Friendly stated:

> . . . the law does not compel the doing of a futile act and we are convinced that after Congress, on February 9, 1973, called on the Secretary of Transportation promptly to submit a report which "provides a full and comprehensive plan for the preservation of essential rail transporation services in the Northeast section of the nation," it was unrealistic to expect that a reorganization court would have authorized an application for large-scale abandonment. 439 F. Supp. 1351, 1373.

Here, as in that case, once the 1975 statutory enactments deprived Appellant of its voluntary withdrawal rights and closed all forums to Appellant for pursuing any application for that purpose, any "desire" or attempt to withdraw became futile, and therefore, unnecessary.

CONCLUSION

We respectfully submit that the determinations of the State Courts that Appellant may not recover compensation for the taking of its property is inconsistent with the holding of this Court in the *Regional Rail Act Cases, supra,* and with the expressed views of a majority of this Court in *San Diego Gas & Electric Co.* v. *San Diego, supra.* To the extent that the determinations below were based upon notions of untimeliness or laches in the commencement of the action, they contravene the teachings in *U.S.* v. *Dickinson,* 331 U.S. 745 (1947); to the extent that they were premised upon the assumed availability of alternative forums or upon waiver, they are in conflict with the principles set forth in *Federal Power Comm.* v. *Hope Natural Gas Co., supra; Monongahela Navigation Co.* v. *U.S., supra;* and *Union Pacific R.R. Co.* v. *Public Service Commission of Mo., supra.* In addition, the holdings that Counts II and III of the Complaint did not state claims upon which relief may be granted is inconsistent with *Brooks-Scanlon Co.* v. *R.R. Comm'n, supra,* and its progeny as well as with the holdings in *Regional Rail Act Cases, supra,* and the views expressed in *San Diego Gas & Electric Co.* v. *San Diego, supra.*

Accordingly, we urge the Court to grant plenary consideration of the issues raised by this appeal.

Respectfully submitted,

STANLEY WEISS, *Counsel for Appellant*
ROBERT E. TURTZ

CARPENTER, BENNETT & MORRISSEY,
Attorneys for Appellant, Motor Club of America Insurance Company.

[APPENDIX FOLLOWS]